No. 88-1905 (16)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KELLER, *et al.*,

Petitioners,

v.

STATE BAR OF CALIFORNIA, *et al.*,

Respondents.

On Writ of Certiorari to the California Supreme Court

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is a private voluntary, professional organization of approximately 363,000 lawyers throughout the United States. In many respects, the ABA serves as the national representative of the legal profession. The ABA's governing bodies are comprised of lawyers in their individual capacities and as representatives of state bar associations, ABA entities and other affiliate legal organizations.

One of the principal goals of the ABA is to promote the administration of justice. In furtherance of this goal, the ABA has consistently called upon its members and the legal profession as a whole to serve the public and the courts. It has encouraged its members through the Rules of Professional Conduct and other policies to provide assistance to governmental entities and to the public

at large in improving the administration of justice and access to the legal system. The ABA has sections, committees and other entities dedicated to studying and taking action to carry out these goals. In 1985, the ABA formed a Commission on Professionalism to consider the role of the profession in this regard. The 1986 Report of the Commission concluded, *inter alia*, that "lawyers should help promote the enactment of legislation that is in the public interest and should encourage consideration of the potential effect of legislation on the courts." *Report of the American Bar Association Commission on Professionalism*, 32-33 (1986).

Subsequently, the ABA established a Special Coordinating Committee on Professionalism. Its mandate provided that it should monitor and implement state and local bar participation in professionalism activities, including activities promoting the administration of justice. To that end, the Committee proposed, and the ABA House of Delegates adopted, a resolution in August 1988 which provided that "lawyers . . . individually and through their appropriate professional organizations, should actively support the enactment of and amendments to federal, state and local legislation designed to improve the administration of justice and the functioning of the legal system." [1] ABA, Special Coordinating Committee

[1] The report attached to the 1988 resolution noted that some courts had placed restrictions or conditions on particular legislative activity by certain mandatory bars. As an example, it cited the recently announced decision of a federal district court in Wisconsin in *Levine* v. *Wisconsin Supreme Court*, 679 F. Supp. 1478 (1988), *rev'd sub nom., Levine* v. *Heffernan*, 864 F.2d 457 (1988), *cert. denied*, 110 S. Ct. 204 (1989). The ABA report expressly recognized that the resolution was not intended to override any such judicially imposed limitations or conditions on particular legislative activity by certain mandatory bars. The report states in this regard: "Clearly it is intended that those professional organizations which may lawfully and properly do so should actively support legislation beneficial to the judicial system. However, it is also clear that the resolution is not directed to *those* integrated bar associations which

on Professionalism, *Report to the House of Delegates* (1989).

The interest of the ABA in this case stems from its belief that the public and state interest in a high quality, fair and efficient system of justice is a compelling one, and that it is the professional responsibility of lawyers actively to support and promote judicial, legislative and private action toward that end. Lawyers, by reason of education and experience, are especially qualified to evaluate the legal system, identify deficiencies and initiate corrective measures. Bar associations provide the organizational framework for lawyers to undertake these tasks. Therefore, the states, in all branches of government, legitimately look to bar associations to assist in promoting public policy by eliciting from the bar its views concerning the impact of a wide range of public issues on the administration of justice. The ABA believes that the relief sought by the petitioners in this case will unduly curtail the states' ability to encourage integrated bar associations to provide vital information to public policymakers.

The ABA wishes to present its views to the Court because it believes that this case raises issues of major significance to the legal profession as a whole. The ABA also believes that the Court, in its consideration of the question presented, might benefit from the ABA's perspective on the role and responsibility of the legal profession and the organized bar in society, particularly with regard to such issues as the administration of justice and the accessibility of the legal system.[2]

may not properly or lawfully engage in *particular* legislative activity." ABA, Special Coordinating Committee on Professionalism. *Report to the House of Delegates* (1988). (Emphasis added.)

[2] Pursuant to Rule 36 of the Rules of this Court, the *amicus* ABA has obtained the written consent of the parties to the filing of this brief, and copies of the letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from a challenge by California attorneys to the use of compelled dues by the State Bar of California to support certain bar activities with which they disagree. The activities at issue include the filing of *amicus curiae* briefs, lobbying activities, adoption of certain positions by the State Bar of California's Conference of Delegates and activities in support of the retention of judges, all of which petitioners characterize as the "advancement of a political and ideological agenda" by the State Bar of California in violation of petitioners' First Amendment rights of speech and association. Pet. 4

Petitioners seek to have this Court adopt a rule of law that would give dissenting members of an integrated bar association a veto power over any public policy activities of the association. Unquestionably, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), suggest that dissenting members of mandatory associations have a First Amendment-protected interest in prohibiting the use of their dues for causes that they do not support. Petitioners overlook, however, the important public policy considerations that exist in the *bar association* context that justify distinguishing bar associations from the labor union at issue in *Abood*.

Unlike a labor union, or other compelled-membership organization, a bar association's participation in debates on issues of law and public policy—even if characterized as "political" or "legislative" or "ideological"—is central, not incidental, to the bar's charter. Bar associations have uniquely valuable contributions to make to the administration of justice and legal reform, in legislative, judicial and administrative forums. Indeed, such endeavors to promote the administration of justice are part of the bar's ethical obligation and are an essential part of the bar's commitment to promote professionalism.

The governmental interests in utilizing the organized bar's knowledge and experience on public policy questions support the bar's participation in activities that are "germane" to its charter. See *Abood*, 431 U.S. at 219 (quoting *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, 235 (1956)). The question whether a particular bar activity is "germane" to the bar's purposes can only be answered with reference to the state's definition of its integrated bar's role and responsibilities, not by any *de novo* judicial interpretation of the "proper" role of the bar.

ARGUMENT

This Court previously has considered the relationship between the First Amendment and the creation and operation of an integrated bar association, which required the mandatory payment of dues by its members. In *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), a member of the Wisconsin Bar challenged the integration of the bar and its use of compelled dues to support legislative activities with which the appellant disagreed as a violation of both his right of free association and his right of free speech.

This Court held that integration of the bar promoted the state's interest in "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal services available to the people of the State . . . ." *Id.* at 843. Moreover, "in order to further the State's legitimate interest in raising the quality of professional services," the Court concluded that the state "may constitutionally require that the costs of improving the profession" be shared by the legal profession, "even though [the bar association] also engages in some legislative activity." *Id.* In "light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues," the Court was "unable to find any impingment upon protected rights of asso-

ciation." *Id.*[3] In that case, however, a majority of the Court declined to reach the appellant's challenge to the legislative activities of the integrated bar on free speech grounds, holding that "on this record we have no sound basis for deciding the appellant's constitutional claim, insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes." *Id.* at 845.

Subsequently, in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the Court addressed the question of whether a labor union's use of compelled dues of public school teachers to promote ideological causes violated the free speech rights of teachers who objected to such use of their dues. In that case, the Court held that the employee's right to freedom of speech protected by the First and Fourteenth Amendments "prohibit[s] the [union and school board] from requiring any of the [teachers] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235.

In so holding, the Court made it clear that such restrictions on use of dues applied only to "ideological activities unrelated to collective bargaining." 431 U.S. at 236. The Court reaffirmed its prior holding in cases such as *Machinists* v. *Street*, 367 U.S. 740 (1961), and *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225 (1965), that "important government interests . . . presumptively support the impingement" on First Amendment-protected interests that result from the use of compelled union dues for activities "germane" to the union's statutory purposes. 431 U.S. at 225; see *id.* at 235.

[3] Justice Brennan authored the plurality opinion for four members of the Court. Justice Harlan, joined by Justice Frankfurter, concurred in the judgment, but would have reached the appellant's "free speech" arguments and would have rejected them. *Id.* at 850. Justice Whittaker also separately concurred in the result. Justices Douglas and Black dissented.

The ABA's concern in this case lies not in debating whether *Abood* should apply to the State Bar of California in particular, given its somewhat unique governmental status and relationship. The ABA, instead, is concerned with emphasizing that, as a general matter, the states have a legitimate concern in advancing the proper and efficient administration of justice through diverse bar association activities. Policymakers at all levels of government have come to depend upon and expect lawyers, through their bar associations, to assist them in understanding the implications of their proposed policies and legislative actions on all aspects of the legal system. The states' interest in receiving such assistance is substantial. Accordingly, the states should be able to rely on the organized bar to take the lead in providing specialized advice and opinions on all matters of public policy "germane" to the bar's charter.

I. STATES HAVE A LEGITIMATE INTEREST IN ADVANCING THE ADMINISTRATION OF JUSTICE THROUGH STATE BAR ACTIVITIES.

Lawyers are in a unique position vis-a-vis the law and the legal system. Through their education and professional experience, they are intimately familiar with both and are ideally situated to identify deficiencies and potential areas for improvement. The ABA standards governing lawyer conduct have long recognized this fact. For many years, Canon 8 of the predecessor ABA *Model Code of Professional Responsibility* provided that "A lawyer should assist in improving the legal system." The aspirational ethical considerations of the ABA Model Code recognized that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . .[and] lawyers should encourage, and should aid in making, needed changes and improvements." ABA, *Model Code of Professional Responsibility* EC 8-9 (1981). The ethical considerations further exhorted lawyers to participate in proposing and supporting legislation and pro-

grams to improve the judicial system; to encourage simplification of laws and repeal or amendment of outmoded laws; and to obtain appropriate changes in the law to prevent unjust results.[4]

In introducing the *Model Rules of Professional Conduct* in 1983 (a revision of the prior *Model Code of Professional Responsibility*), the ABA delegated generally aspirational provisions from the rules since they were not subject to disciplinary enforcement. Nonetheless, the ABA considered the lawyer's obligation to participate in legal reform activities as being of such overarching importance that it retained a single aspirational standard in its Model Rule 6.1 relating to the public service responsibilities of lawyers. Rule 6.1 provides in relevant part as follows: "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by . . . service in activities for improving the law, the legal system or the legal profession . . . ." Further, the Preamble to the Model Rules, which sets forth the guiding principles of the legal profession, gives special emphasis to the lawyer's opportunity to seek improvement of the law as follows:

> As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education . . . . A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

ABA, *Model Rules of Professional Conduct, Preamble* ¶ 5 (1983).

[4] These aspirational ethical considerations are still in effect in the following 15 jurisdictions' codes of professional conduct: Alabama, Alaska, Colorado, the District of Columbia, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, New York, Ohio, South Carolina, Tennessee, Vermont, and Virginia.

Given the profession's ethical obligation to address such public issues, it is entirely appropriate for state legislatures and courts to call upon the legal profession to advise them of ways to improve the administration of justice and to assist in public education about the law and the legal system. The means by which the states have traditionally called upon the resources of the bar is through the state bar associations that have been created and maintained through legislative or judicial acts. Today, of the 52 jurisdictions (including the 50 states, the District of Columbia and Puerto Rico), 33 are integrated.[5] The constitutions and by-laws of the bar associations provide that advancing the administration of justice and promoting reform in the law and judicial procedure are among their chief objectives.[6]

[5] The 33 integrated jurisdictions are Alabama, Alaska, Arizona, California, District of Columbia, Florida, Georgia, Hawaii (as of November 1, 1989), Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington (State), West Virginia and Wyoming.

The 19 jurisdictions that are not integrated are Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont and Wisconsin. In Wisconsin, the integrated bar is operating as a voluntary bar association pending the outcome of the *Levine* v. *Heffernan case*.

Four of the 33 integrated jurisdictions also have voluntary jurisdiction-wide bar associations: District of Columbia, North Carolina, Virginia and West Virginia.

[6] *See, e.g.*, State Bar of Arizona By-Laws, Article II; State Bar Association of North Dakota Constitution and By-Laws, Article II (Amended July 1, 1989); Rhode Island Bar Association By-Laws, Article II; Washington State Bar Association By-Laws, Article I, Section 1; State Bar of Michigan Bar Rules I. The ABA constitution similarly specifies its purpose "to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions." ABA, Rules of Procedure of the House of Delegates, *Constitution and Bylaws*, Article I, § 1.2 (1989-90).

Myriad activities fall within the state bar associations' mandate to advance the administration of justice. Such activities may be conducted solely by or within the membership of the bar or they may be conducted in conjunction with the courts and legislatures. Often, they directly involve judicial procedure or administration of the courts. For example, based upon a survey of state and local bar activities conducted by the ABA in 1987, 50 percent of all state bars conducted ongoing organized activities to review court practices and procedures and consider ways in which to reduce civil court delay. Sixty-four percent conducted activities to promote alternative dispute resolution. Thirty-eight percent conducted written surveys of lawyers on the qualifications of candidates for judicial office. Sixty-one percent undertook organized activities regarding judicial salaries. *ABA Bar Activities Inventory*, Table 3 (Dec. 1987).

Examples of some specific initiatives in this area include: support by the Virginia Bar of legislation concerning merit selection of appellate judges and pay increases for state judges; assistance by the State Bar of South Dakota in the revision of pattern jury instructions; and the filing by the State Bar of California of an *amicus curiae* brief (addressing the appearance of non-attorneys in court on behalf of corporations), which is one of the specific bar activities complained about here. App. E-11.

Advancing the administration of justice goes beyond statutory reform and includes direct activities to improve access to the system of justice, as well. State bars are a critical resource in addressing this problem. According to the 1987 ABA survey, 64 percent of state bars operated pro bono programs with staff support. Those programs provided legal service to the poor, the elderly, the handicapped and other disadvantaged groups. Forty-one percent of state bars compiled data on the number of

hours spent by members on pro bono matters. State bars also have encouraged private bar participation in state public defender programs.

Another way in which state bars act to advance the administration of justice is by participation in the revision of complex or outmoded statutory or regulatory schemes. In such instances, the expertise of lawyers who work closely with the laws at issue is invaluable.[7] Thus, in 1985, the Wisconsin Bar supported revision by the legislature of state homicide statutes, in order to clarify confusing language and achieve conformity with recent judicial interpretations. *Wisconsin Bar Bulletin* 23 (Feb. 1987). In addition, it supported reform of the state's corporation statute to bring it more in line with the ABA's model corporation act. *Wisconsin Bar Bulletin* 10 (Mar. 1987). Similarly, in the area of trusts and estates, the Virginia Bar lobbied in support of the Uniform Transfers to Minors Act and, in the area of real estate, it lobbied in support of the Uniform Federal Lien Recordation Act.

In each of these instances, the state benefited substantially from the collective legal knowledge of the bar and its expertise concerning various matters affecting the law and the legal system. Thus, allowing the bar to use its resources to promote such "public" law activities constitutes an important interest which members of this Court and other courts have recognized. For example, Justice Brennan, in *Lathrop*, stated that "the bulk of

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[7] In recognition of this fact, the ABA maintains the following sections and divisions which focus on substantive areas of law: Administrative Law and Regulatory Practice, Antitrust Law, Business Law, Criminal Justice, Family Law, International Law and Practice, Labor and Employment Law, Natural Resources, Energy and Environmental Law, Patent, Trademark and Copyright Law, Public Utility Law, Real Property, Probate and Trust Law, Taxation, Tort and Insurance Practice, and Urban State and Local Government Law.

State Bar activities serve the function . . . of elevating the educational and ethical standards of the Bar to the end of improving the quality of legal services available to the people of the State. . . ." 367 U.S. at 843. "It cannot be denied" that such a goal is a "legitimate end of state policy." *Id.*

Similarly, Justice Harlan, in his concurrence in *Lathrop*, found a "most substantial state interest" in "having the views of the members of [the] Bar 'on measures directly affecting the administration of justice and the practice of law.'" *Id.* at 864. Lower federal and state courts, including courts that have followed *Abood* as petitioners urge here, also have recognized that promoting and improving the administration of justice is a state interest of the highest order and, accordingly, an appropriate object of integrated bar activities. *Hollar* v. *Virgin Islands*, 857 F.2d 163, 170 (3d Cir. 1988); *Gibson* v. *Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986); *Falk* v. *State Bar of Michigan*, 418 Mich. 270, 342 N.W.2d 504, 511 (S. Ct. Mich. 1983), *cert. denied*, 469 U.S. 925 (1984).

II. THE STATE INTEREST IN BAR ACTIVITY ADVANCING THE ADMINISTRATION OF JUSTICE IS DIFFERENT THAN THE STATE INTEREST AT ISSUE IN *ABOOD*.

As a point of departure in analyzing the state interest, this Court in *Abood* did not absolutely prohibit the use of compelled dues for political or ideological activity. To the contrary, it prohibited the use of dissenting members' dues for such activity when it was not "germane" to the state's interest in promoting collective bargaining. 431 U.S. at 235. In fact, the Court expressly acknowledged that certain "germane" activities necessarily would be viewed as political or ideological. *Id.* at 236.[8] It recog-

[8] The Court noted that "a written collective-bargaining agreement prescribing the terms and conditions of public employment

nized the "difficult problems in drawing lines," but did not ban "political" or "ideological" activities simply for that reason (*id.*) as petitioners urge this Court to do here. See Pet. Br. 26.

Moreover, "political" and "ideological" activity, particularly if those terms are used in reference to or interchangeably with legislative activity, as petitioners employ them in this case, is unquestionably "germane" to the state interest in advancing the administration of justice. Lower courts applying *Abood* have noted this distinction:

> [T]he union's need to undertake political activities is more of a necessary consequence of the collective bargaining system than an independent, important interest. On the other hand, the integrated Bar has been recognized by the State as possessing special training and experience with which to serve in an advisory function to the various branches of state government and to help "improve the administration of justice." While this advisory function is not the Bar's only function or even its most important function, the Bar's capacity and responsibility to advise and educate gives rise to a compelling governmental interest distinct from that of . . . [a] union.

Gibson v. *Florida Bar*, 798 F.2d at 1568. The state interest in having the organized bar participate in the legislative or other "political" process—particularly with regard to legal reform—is based upon the unique relationship of lawyers to the legal system and the law. As a result of this relationship, discussed in Part I, state bar associations have a broad mandate to address public concerns. In contrast to labor unions, their purpose extends far beyond advancing the cumulative economic interests of their members. Thus, at least in this context,

may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." 431 U.S. at 236.

political activity is more appropriately undertaken by a bar association than a union.

The Supreme Court of Michigan expressly recognized this fact in considering "political activity" by its integrated bar:

> The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing and interpreting the law. In this sense, the State Bar is quite different from the labor union involved in *Abood*. It is true that the government might have a keen interest in the legislative participation of a labor union in specialized areas of the law touching directly on the field of employment of the union members or on the area of collective bargaining. But lawyers are involved with law in almost all its forms. Therefore, their input is of broader interest to the Legislature. In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature. Certainly, the Legislature is greatly aided by the collective wisdom of the practitioners who make up the Taxation Section of the bar when it revises state taxation provisions. Similarly, the input of the Criminal Law Section is invaluable to the Legislature in the tasks of revising Michigan's Criminal Code.

Falk v. *State Bar of Michigan*, 342 N.W.2d at 514. Such an analysis of appropriate bar association activities is consistent with this Court's decision in *Lathrop*, which acknowledged the legitimacy of legislative activity by the integrated bar.[9] 367 U.S. at 843. Indeed, Justice Harlan,

[9] As an initial matter, state bar activity traditionally has been supervised by the states. See *Lathrop*, 367 U.S. at 849. The logic behind this tradition is clear and applies here. Each state is in the best position to determine the role and responsibilities that its bar should fulfill. That determination will vary from state to state. Similarly, each state is in the best position to determine the appropriate limitations, if any, upon the activities of its bar. That determination will vary, as well. Moreover, limitations are best determined on a case-by-case basis, which is possible if they are left to the states. In this manner, as controversies arise, state courts in conjunction with state bars will decide whether particular activities are germane to the state's interest in advancing the administration of justice.

in his concurring opinion described "legislative and other programs of law reform" undertaken by the bar as "among the most useful and significant branches of its authorized activities." *Id.* at 848. Thus, this Court should be extremely reluctant to develop a rule of law that would give dissenting members a veto over the ability of bar associations to participate in public efforts towards legal reform and thereby deprive state policymakers of valuable information and insights that the bar is uniquely qualified to provide.

CONCLUSION

The relief sought by petitioners unduly restricts integrated state bar activities. Its practical effect would be to preclude integrated state bar activity which promotes vital state interests. Accordingly, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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